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No. 91-160

In The

Supreme Court of the United States

October Term, 1991

FIRST FEDERAL SAVINGS BANK & TRUST, ET AL.,
Petitioners,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM
TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ARGUMENT

1. The government's opposition is flawed in two respects. First, it mischaracterizes the nature of the relief sought by petitioners.[1] Second, in denying a conflict in the circuits, it misunderstands the import of the

[1] Respondents also contend at p. 6, n.4, that the issue regarding application of the enhanced thrift capital standards was not raised below. The Sixth Circuit majority did not address petitioners' claims, but these were briefed and argued in the Sixth Circuit. The request for an injunction was not the only issue raised on the appeal; it was simply mischaracterized as a single issue by the majority. The issues presented to the Court of Appeals were as follows:

(I) Whether the district judge erroneously denied a preliminary injunction because he lacked power to enjoin the appointment of a receiver prior to the 30 day window in 12 U.S.C. § 1464(d)(2)(G)?

(II) Whether the district court erred in finding no likelihood of success on the merits because the government is not required to honor its agreements if subsequent legislation excuses its compliance?

(*concluded on page 2*)

ruling below and the ruling of the Federal Circuit in *Far West Bank* v. *OTS*, 930 F.2d 883 (Fed. Cir. 1991).

2. In seeking judicial review, First Federal does not request a blanket order enjoining the agency from ever appointing a receiver or conservator. Rather, First Federal sought judicial review of final agency action and, among other things, asked for relief narrowly limited to barring the appointment of a receiver or conservator because the agency improperly abrogated its contract under the rule petitioners claimed was illegal.[2] First Federal challenged the OTS rule adopted under FIRREA to abrogate First Federal's contract. First Federal sought to declare the rule invalid and therefore to enjoin application of *that* rule, and also sought to rescind its contract with the agency. The issue raised by petitioners is a purely legal one. The relief petitioners seek is that which is ordinarily permitted by the APA. Petitioners asked that the OTS rule adopted under FIRREA be declared illegal. *See* 5 U.S.C. § 706(2) (reviewing court shall "hold unlawful . . . agency action"). That ruling and the necessary relief in no way interferes with or usurps

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(*continued from page 1*)

(III) Whether the district [court] erred in finding no likelihood of success because no fifth amendment takings claim was presented and injunctive relief against improper takings is not possible?

(IV) Whether the appointment of a receiver prior to any neutral judicial review on the facts presented violates due process. U.S. Const. Am. V?

(Appellants' Brief, p. vi). Further, Appellants' Brief, pp. 26-40, specifically discusses § 401(g) and wrongful contract abrogation. The government has simply misreported the proceedings in the Court of Appeals.

[2] Even if petitioners' complaint had sought broader relief as well, that is no basis for denying jurisdiction. *See* Fed. R. Civ. P. 8 ("relief in the alternative or of several different types permitted"); *id.*, Rule 54(c) ("judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings").

the agency's ability to take future action. Indeed, the relief petitioners seek here is essentially no different from that in the companion case of *Franklin Federal Savings & Loan Bank* v. *OTS*, 927 F.2d 1332 (6th Cir. 1991), *cert. pending*, No. 90-1881, which the Court of Appeals held *was* ripe for review. To construe 12 U.S.C. § 1464 (d)(2)(E) and (G) as invalidating any injunction against an official exercise of authority completely belies the presumption of judicial review of administrative action. *See Charter Federal Savings Bank* v. *Director, Office of Thrift Supervision, et al.*, ___ F. Supp. ___ (No. 91-0012A, decided Aug. 6, 1991), and *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991). The government concedes that their issuance of Thrift Bulletin 38-2 triggered the district court's power to review whether OTS' action abrogated contracts that were preserved under FIRREA. *See Franklin Federal*, No. 90-1881 (Brief for the Respondents in Opposition). Given that concession, there can be no bar to an injunction against the appointment on the grounds deemed illegal.

3. Against this background, the government's assertion that *no* injunctive relief to halt an appointment — even against final agency action held illegal — is available until after the appointment of a receiver or conservator is plainly wrong. The government's submission totally disregards this Court's recent decision in *McNary*. There, the Court allowed for judicial review and equitable relief challenging a variety of INS policies governing the grant of asylum. The Court specifically noted that relief could be granted without awaiting a deportation order and without interfering with future agency action. In short, there is no basis for denying a federal court the longstanding authority to enjoin action based on final agency rule. Under the government's view, virtually all OTS rules and regulations would be immunized from equitable relief until the appointment of a receiver

and the institution is destroyed. It goes without saying that at that point, equitable relief is of little use to the regulated entity.

4. Respondents dismiss petitioners' contentions that due process is offended by denial of any pre-appointment review and agency control of the evidence presented in the post-deprivation hearing. They rely on *Fahey* v. *Mallonee*, 332 U.S. 245 (1947), and a general assertion that on-the-record administrative review accords a full and fair opportunity for a hearing. But *Fahey* explicitly declined to decide the questions presented here. This Court did not consider the due process ramifications in the context of a planned merger of the failed entity, because the Solicitor General had specifically assured the Court that no merger was planned. Pet. p. 20; *Fahey*, 322 U.S. at 257. Additionally, the government ignores its role in inducing petitioners' investment in the insolvent Florida thrift, and then reneging on its contractual promises without explicit legislative authority. Given the government's conduct, it is unlikely to be an impartial adjudicator in an after-the-fact hearing. Without pre-appointment review, those claims can never be heard. *See Coit Indep. Joint Venture* v. *Fed. Sav. & Loan*, 109 S. Ct. 1361 (1989).

5. The government wrongly dismisses petitioners' claims that the decision here conflicts with the Federal Circuit's ruling in *Far West*. The government has misunderstood the decision below and the Federal Circuit's ruling in *Far West*. In *Far West*, the Federal Circuit held that the federal district courts have jurisdiction to grant equitable relief — i.e., rescission — to thrifts claiming the OTS' rule is a breach of contract. In clear conflict, the Sixth Circuit has essentially directed the petitioners here and in *Franklin* to the Claims Court. Thus, the Federal Circuit finds jurisdiction over rescission claims in

the regional district courts while the Sixth Circuit directs similarly situated litigants to the Claims Court.

This conflict can lead only to chaos in the federal district and circuit courts and uneven application of the law. The Federal Circuit has appellate jurisdiction over appeals of orders granting or denying motions to transfer an action to the Claims Court. *See* 28 U.S.C. § 1292(d)(4)(A). Thus, under its ruling in *Far West*, the Federal Circuit would allow these cases to remain in the regional district courts. Yet (particularly in the Sixth Circuit) litigants would be told to go to the Claims Court. Indeed, after the filing of the certiorari petition, the district court in *Charter*, *supra*, granted the identical declaratory relief which *Far West* found available in the regional district courts. Relying on *Far West*, the court in *Charter* declared that any agency enforcement action which would substantially burden the thrift's operations due to the use of supervisory goodwill would rescind the contract. The court thus concluded that rescission was available. It also ruled that conservatorship or receivership would substantially burden Charter's operations. The ruling in *Charter* — consistent with the Federal Circuit's ruling in *Far West* — assures that until this Court resolves the issue, confusion will reign in the lower courts on this important jurisdictional ruling.

The Sixth Circuit's opinion not only conflicts with *Far West*, it also ignores *Bowen* v. *Massachusetts*, ___ U.S. ___, 108 S. Ct. 2722 (1988), which recognized that not all monetary disputes are relegated to the Claims Court. In *Bowen* v. *Massachusetts*, the Court held that federal district courts have jurisdiction to review decisions denying reimbursement to states under the Medicare program, even when the necessary effect of the court's order is the payment of money. *See Bowen*, 108 S. Ct. at 2740. Here, as in *Bowen*, petitioners seek "specific relief"

(*id.*) — only rescission — not "money damages." Petitioners simply wish to be restored to the status quo existing before the abrogation of its contract. Since *Bowen* allowed the exercise of jurisdiction in the district court for specific relief that inevitably required the United States to pay out money, a fortiori there is jurisdiction in district court to simply restore the parties to the status quo.

CONCLUSION

For the reasons previously stated in the petition and herein, a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be issued and this case set for plenary review.

Respectfully submitted,

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